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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, in her official capacity as President of the University of California,

Plaintiffs,

V.

U.S. DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security,

Defendants.

CASE NO. 17-CV-05211-WHA

JOINT CASE-MANAGEMENT STATEMENT

Date: October 22, 2020
Time: 11:00 AM
Judge: Hon. William Alsup
Trial Date: None set
Action Filed: September 8, 2017

1 STATE OF CALIFORNIA, STATE OF
2 MAINE, STATE OF MARYLAND, and
3 STATE OF MINNESOTA,

4 Plaintiffs,

5 v.

6 U.S. DEPARTMENT OF HOMELAND
7 SECURITY, ELAINE DUKE, in her official
8 capacity as Acting Secretary of the Department
9 of Homeland Security, and the UNITED
10 STATES OF AMERICA,

11 Defendants.

12 CITY OF SAN JOSE, a municipal corporation,

13 Plaintiffs,

14 v.

15 DONALD J. TRUMP, President of the United
16 States, in his official capacity, ELAINE C.
17 DUKE, in her official capacity, and the
18 UNITED STATES OF AMERICA,

19 Defendants.

20 DULCE GARCIA, MIRIAM GONZALEZ
21 AVILA, SAUL JIMENEZ SUAREZ,
22 VIRIDIANA CHABOLLA MENDOZA,
23 NORMA RAMIREZ, and JIRAYUT
LATTHIVONGSKORN,

24 Plaintiffs,

25 v.

26 UNITED STATES OF AMERICA, DONALD
27 J. TRUMP, in his official capacity as President
28 of the United States, U.S. DEPARTMENT OF
HOMELAND SECURITY, and ELAINE
DUKE, in her official capacity as Acting
Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05235-WHA

CASE NO. 17-CV-05329-WHA

CASE NO. 17-CV-05380-WHA

1 COUNTY OF SANTA CLARA and
 2 SERVICE EMPLOYEES INTERNATIONAL
 3 UNION LOCAL 521,

4 Plaintiffs,

5 v.

6 DONALD J. TRUMP, in his official capacity
 7 as President of the United States, JEFFERSON
 8 BEAUREGARD SESSIONS, in his official
 9 capacity as Attorney General of the United
 States; ELAINE DUKE, in her official
 capacity as Acting Secretary of the Department
 of Homeland Security; and U.S.
 DEPARTMENT OF HOMELAND
 SECURITY,

10 Defendants.

11 **JOINT CASE-MANAGEMENT STATEMENT**

12 Plaintiffs and Defendants in the above-captioned matters respectfully submit this Joint
 13 Case-Management Statement pursuant to this Court's Standing Order and its Orders of September
 14 1, 2020 (Dkt. No. 305) and September 23, 2020 (Dkt. No. 308). Counsel for the parties have met
 15 and conferred on these matters during the week of October 12, 2020.

16 **1. Plaintiffs' Summary of the Case**

17 On June 18, 2020, the U.S. Supreme Court held that the U.S. Department of Homeland
 18 Security's (DHS) rescission of the Deferred Action for Childhood Arrivals (DACA) program was
 19 arbitrary and capricious in violation of the Administrative Procedure Act (APA) and therefore
 20 must be vacated. *Dep't of Homeland Sec., et al. v. Regents of the Univ. of Cal., et al.*, 140 S. Ct.
 21 1891 (2020). The Supreme Court's decision rested on a finding that, even if DHS's purported
 22 concerns about the lawfulness of DACA were credited, DHS had failed to consider options for
 23 modifying DACA short of rescinding the program altogether and failed to address whether there
 24 had been legitimate reliance on the program.

25 Despite clear directives from the Supreme Court, as well as the decisions of many other
 26 courts—including this Court and the Ninth Circuit—that found Defendants' rescission of DACA
 27 arbitrary and capricious, Defendants persisted in their efforts to rescind DACA. Forty days after
 28 the Supreme Court's decision, Defendants announced immediate "interim" modifications to the

1 program. On July 28, 2020, Defendant Chad Wolf, the purported Acting Secretary of DHS,
 2 issued a memorandum (the “Wolf Memorandum”) directing DHS personnel to (1) reject all
 3 pending and future DACA applications, (2) cut the DACA renewal period (and accompanying
 4 work authorization) in half, and (3) reject all pending and future applications for advance parole
 5 (i.e., permission to travel outside the United States and return lawfully).

6 The Wolf Memorandum offers no basis for these modifications to DACA other than
 7 purported Acting Secretary Wolf’s “strong desire” to “mitigate” supposed concerns about the
 8 program while he buys time to “consider[] anew the DACA policy.” As with DHS’s earlier
 9 efforts to rescind DACA, the Wolf Memorandum fails to adequately take into account the vast
 10 programmatic benefits of the policy or of the reliance interests it has engendered, nor does it
 11 include any reasoned policy analysis for why DACA should be restricted and impaired.
 12 Moreover, although Defendant Wolf has purported to be Acting Secretary of the Department of
 13 Homeland Security since November 13, 2019, he has no legally valid claim to that title. He thus
 14 lacked authority to issue the Wolf Memorandum, which is void and lacks any legal force.

15 On August 24, 2020, purported Deputy Director for Policy for United States Citizenship
 16 and Immigration Services Joseph Edlow issued a memorandum (the “Edlow Memorandum”)
 17 implementing the Wolf Memorandum. Memorandum to Associate Directors and Program Office
 18 Chiefs re: Implementing Acting Secretary Chad Wolf’s July 28, 2020 Memorandum,
 19 “Reconsideration of the June 15, 2012 Memorandum ‘Exercising Prosecutorial Discretion with
 20 Respect to Individuals Who Came to the United States as Children,’” available at
 21 <https://www.uscis.gov/sites/default/files/document/policy-alerts/dacamemo.pdf>. In addition, the
 22 Edlow Memorandum directed DHS staff to “generally reject DACA renewal requests received
 23 more than 150 days prior to the expiration of the DACA recipient’s current DACA validity
 24 period.” *Id.*

25 Plaintiffs believe that the Wolf and Edlow Memoranda violate both the procedural and
 26 substantive requirements of the APA, 5 U.S.C. § 706, the Federal Vacancies Reform Act, 5
 27 U.S.C. § 3345 et seq. (FVRA), the Homeland Security Act, 6 U.S.C. § 101 et seq., the Due
 28 Process Clause of the Fifth Amendment, the Appointments Clause, U.S. Const. art. II, § 2, cl. 2,

1 and constitute ultra vires agency actions. Moreover, because Defendants have stopped filing
 2 quarterly summary reports regarding the processing of DACA requests, in accordance with the
 3 injunction that this Court entered on January 9, 2018, Dkt. No. 234, it is not clear whether they
 4 are otherwise complying with their legal obligations consistent with the Supreme Court's
 5 decision.

6 **2. Defendants' Summary of the Case**

7 This litigation has never been about "whether DHS may rescind DACA"—in fact, before
 8 the Supreme Court, "[a]ll parties agree[d] that it may," and the Supreme Court offered no reason
 9 to doubt that consensus. *Regents*, 140 S. Ct. at 1905. As another court put it, "Defendants
 10 indisputably can end the DACA program." *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401
 11 (E.D.N.Y. 2018); *vacated and remanded on other grounds by Regents*, 140 S. Ct. at 1891. There
 12 can likewise be no dispute that the Department of Homeland Security may *modify* a discretionary
 13 non-enforcement policy like DACA, at any time, so long as it provides a sufficient explanation.
 14 The agency has now done so: for the reasons explained in the Wolf Memorandum, until further
 15 notice, DHS has modified DACA, while retaining its core—including by allowing current DACA
 16 recipients to renew indefinitely.

17 On July 28, 2020, one week before issuance of the Ninth Circuit's mandate in this case,
 18 Acting Secretary Wolf formally rescinded the Duke Memorandum. The Wolf Memorandum
 19 announced the Acting Secretary's determination, "[i]n accordance with the Supreme Court's
 20 decision," "to give careful consideration to whether the DACA policy should be maintained,
 21 rescinded, or modified." ECF No. 301-1, Wolf Mem. at 5. Given the Acting Secretary's serious
 22 enforcement-policy concerns, the Wolf Memorandum also made certain immediate changes to
 23 DACA. *Id.* at 4-5.

24 The Wolf Memorandum explains that, until further notice, DHS (1) will not accept first-
 25 time DACA requests; (2) will continue to accept renewal requests from DACA recipients, though
 26 it will limit the period of any future grants of DACA to one year, rather than the two years
 27 provided under the original DACA policy; and (3) will allow DACA recipients to submit
 28 applications for advance parole, to be granted only in "exceptional circumstances." *See id.* at 5.

1 These changes apply to both pending and prospective requests. *Id.* at 7. The Wolf Memorandum
 2 noted that “nothing in this memorandum precludes the exercise of deferred action on a truly
 3 individualized, case-by-case basis when and if warranted.” *Id.* at 6. The Wolf Memorandum also
 4 reiterates that DHS will “[c]ontinue to comply with the information-sharing policy” announced in
 5 2012 regarding information provided by DACA requestors. *Id.* at 8.

6 As Defendants will explain in greater detail in a forthcoming dispositive motion, the Wolf
 7 Memorandum fully complies with the APA, including as interpreted by the Supreme Court in
 8 *Regents*.¹ And Chad Wolf’s service as Acting Secretary of Homeland Security fully complies
 9 with the Federal Vacancies Reform Act, the Homeland Security Act, and the Appointments
 10 Clause. And even if there were some appointment-related defect, any such defect has now been
 11 cured by ratification.

12 **3. Amendment of Pleadings**

13 Plaintiffs plan to amend their complaints to reflect the Supreme Court’s ruling relating to
 14 Defendants’ prior attempts to rescind DACA, and Defendants’ recent DACA-related actions,
 15 including their promulgation of the Wolf and Edlow Memoranda. Plaintiffs will file these
 16 amended complaints by November 2, 2020. In those amended complaints, Plaintiffs plan to
 17 substitute some of the currently named Defendants to reflect the fact that different individuals are
 18 now occupying the relevant roles, and add additional responsible officials (including, but not
 19 necessarily limited to, Joseph Edlow, who is occupying the position of Deputy Director for Policy
 20 for United States Citizenship and Immigration Services) as Defendants.

21 Plaintiffs’ proposed amended complaints will raise the following legal issues:

- 22 A. Whether Defendants’ actions are invalid under the FVRA because the issuing
 23 officials lacked proper authority to take those actions.
- 24 B. Whether Defendants’ actions are invalid under the Homeland Security Act because
 25 the issuing officials lacked proper authority to take those actions.
- 26

27 ¹ Plaintiffs are correct that “Defendants have stopped filing quarterly summary reports
 28 regarding the processing of DACA requests.” That requirement derived from this Court’s
 preliminary-injunction order, which is no longer in effect. *See Regents*, 140 S. Ct. at 1916.

- 1 C. Whether Defendants' actions are invalid under the Appointments Clause of the
 2 United States Constitution because the issuing officials lacked proper authority to
 3 take those actions.
- 4 D. Whether Defendants' actions violate the APA because Defendants acted in an
 5 arbitrary and capricious manner.
- 6 F. Whether Plaintiffs are entitled to a permanent injunction, declaratory relief, and other
 7 relief as will be requested in their amended complaints.

8 **4. Motions**

9 All parties agree that this case should be resolved through cross-motions for summary
 10 judgment. Plaintiffs also reserve their right to move for a temporary restraining order or
 11 preliminary injunction if Defendants take any action to rescind the DACA program as indicated
 12 in the Wolf Memorandum. If Defendants provide an inadequate administrative record, Plaintiffs
 13 reserve their right to seek appropriate relief.²

14 The parties are agreeable to, when possible, consolidating their briefing in a similar manner
 15 to how they proceeded in the 2017 litigation. The Court ordered as follows in its Case
 16 Management Order:

17 All plaintiffs shall file one joint brief A plaintiff may, if truly essential, add a
 18 very short supplemental brief on any point unique to that plaintiff. All defendants
 19 may file a joint brief in support of their own motion All plaintiffs shall file a
 20 single joint opposition, and all defendants shall file a single joint opposition, each
 21 party being permitted to file a short individual supplement to the extent truly
 22 needed for issues unique to that party.

23 Dkt. No. 49.

24 **5. Discovery**

25 Relating to the Duke Memorandum, Plaintiffs propounded written discovery on Defendants
 26 in 2017, and noticed several depositions. Defendants produced witnesses and provided responses

26 ² Defendants have already produced an administrative record as to the Wolf Memorandum
 27 in the DACA-related matters in the Eastern District of New York. *See, e.g., Batalla Vidal, et al.*
 28 *v. Wolf, et al.*, 1:16-cv-4756 (E.D.N.Y.), Dkt. No. 282 (Sept. 24, 2020). Defendants also
 29 produced a privilege log, in which they identify numerous documents that were considered by the
 30 decision-maker or his subordinates but withheld from the administrative record based on a
 31 number of privileges. *See, e.g., Batalla Vidal*, Dkt. No. 282-1.

1 to these discovery requests; however, discovery was stayed by the Ninth Circuit. *See In re:*
 2 *United States*, Case No. 17-72917, Dkt. No. 14 (Oct. 24, 2017). That stay order came before
 3 Plaintiffs were able to complete their depositions or access the written responses to discovery that
 4 Defendants produced. Thus, Plaintiffs have not had the opportunity to review these documents or
 5 complete their depositions.

6 Because the Duke Memorandum was vacated by the Supreme Court, Plaintiffs do not
 7 intend to continue discovery relating to its promulgation. However, depending on the contents of
 8 the administrative record and the accompanying privilege log, Plaintiffs reserve their right to seek
 9 discovery on some of their claims relating to the Wolf and Edlow Memoranda. Thus, the parties
 10 propose to meet and confer on the issue of discovery after production of the administrative record
 11 and privilege log and, if necessary, to update the Court on their plans in this regard at a later date.

12 **6. Relief**

13 In their amended complaints, Plaintiffs plan to request that the Court:

- 14 A. Declare that the actions that Defendants have taken to implement the Wolf and Edlow
 Memoranda are arbitrary, capricious, an abuse of discretion, in excess of statutory
 authority, and otherwise not in accordance with law in violation of the APA;
- 15 B. Declare that Defendant Wolf's service as Acting Secretary of Homeland Security violates
 the FVRA;
- 16 C. Declare that Defendant Wolf's actions taken as Acting Secretary of Homeland Security
 and/or in the performance of the functions or duties of the Secretary of Homeland
 Security, including his purported change to DACA policy and procedure, have no force
 and effect and may not be ratified pursuant to the FVRA;
- 17 D. Declare that Defendant Wolf's service as Acting Secretary of Homeland Security violates
 the Homeland Security Act of 2016;
- 18 E. Declare that Defendant Wolf's service as Acting Secretary of Homeland Security violates
 the Appointments Clause of the United States Constitution;
- 19 F. Enjoin Defendants from altering or limiting the DACA program or engaging in any action
 to frustrate its full and continued implementation;

- 1 G. Vacate the Wolf and Edlow Memoranda; and
 2 H. Award such additional relief as the interests of justice may require.

3 **7. Scheduling.**

4 The parties have agreed on the following schedule:

- 5 • Plaintiffs shall file their amended complaints on or before November 2, 2020. Defendants
 agree to accept service of the amended complaints via service through the ECF system.
- 6 • Defendants shall file the administrative record as to the Wolf Memorandum on or before
 November 9, 2020. Defendants take the position that they are not required to prepare a
 separate administrative record for the Edlow Memorandum.
- 7 • As discussed above, after Defendants file the administrative record, the parties will meet
 and confer regarding its contents. Depending on the outcome of those discussions,
 Plaintiffs reserve their right to dispute the completeness of the administrative record. If it
 proves to be necessary, Plaintiffs intend to file any motion for completion of the
 administrative record by November 19, 2020.
- 8 • The parties have agreed on the following briefing schedule for their forthcoming cross-
 motions for summary judgment:
 - 9 ○ **January 22, 2021 at 12 PM:** Plaintiffs' motion for summary judgment (40 pages)
 - 10 ○ **February 12, 2021 at 12 PM:** Defendants' combined cross-motion for summary
 judgment and opposition to Plaintiffs' motion for summary judgment (45 pages)
 - 11 ○ **March 5, 2021 at 12 PM:** Plaintiffs' combined opposition and reply (30 pages)
 - 12 ○ **March 19, 2021 at 12 PM:** Defendants' reply (25 pages)
 - 13 ○ **Oral argument:** at the Court's convenience.
- 14 • Plaintiffs reserve the right to file earlier targeted motions regarding particular discrete
 issues, including motions for preliminary injunction or partial summary judgment motions
 that do not depend on the administrative record but challenge Defendants' legal authority
 to hold office and to take the relevant administrative actions.

- 1 • If the issues in this case are not resolved by these dispositive motions, the parties agree to
2 meet and confer within 14 days of the Court's ruling on such motions to discuss a
3 schedule for further proceedings.
4 • The parties agree that Defendants' obligation to answer or otherwise respond to the
5 amended complaints shall be stayed pending the Court's resolution of the parties'
6 dispositive motions.

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1 Dated: October 15, 2020

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ATTESTATION OF SIGNATURES

I, James F. Zahradka II, hereby attest, pursuant to Local Civil Rule 5-1(i)(3) of the Northern District of California that concurrence in the filing of this document has been obtained from each signatory hereto.

Dated: October 15, 2020

/s/ James F. Zahradka II
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Attorney for State of California